No. 09-1476

IN THE

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] This case concerns the extent to which the First Amendment right to petition the government for redress of grievances protects public employees from retaliation by their employers for litigating employment law claims through the proper legal procedures. Many of the employees represented by AFL-CIO affiliates are public employees. The AFL-CIO has, therefore, frequently filed *amicus curiae* briefs in cases concerning the constitutional rights of public employees. *See, e.g., City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The AFL-CIO also has an interest in ensuring that employees are free to seek enforcement of employment laws without fear of employer retaliation and has filed *amicus* briefs in cases concerning the anti-retaliation provisions of various employment laws. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834.

STATEMENT

In February 2003, the Borough of Duryea, Pennsylvania discharged Charles Guarnieri from employment as

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[1] Counsel for the petitioners and counsel for the respondent have each filed a letter with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Chief of Police. Pet. App. 4a. Guarnieri successfully arbitrated a claim that his discharge was not for "just cause" and was reinstated in January 2005 pursuant to the arbitration award. *Ibid.* Immediately upon Guarnieri's reinstatement, the Borough began taking a number of adverse employment actions against him. *Id.* at 4a-5a. Guarnieri challenged those adverse actions through a variety of channels, including the instant § 1983 lawsuit asserting that, by retaliating against him for arbitrating his wrongful discharge claim, the Borough abridged his First Amendment right to petition for redress of grievances. *Id.* at 5a. Ruling on Guarnieri's § 1983 claim, a jury found that the Borough had retaliated against Guarnieri for arbitrating his discharge claim. *Id.* at 5a-6a.

Guarnieri's legal challenge to his 2003 discharge implicated two statutes governing the employment of police and fire personnel by political subdivisions of Pennsylvania such as the Borough of Duryea: the Civil Service for Police and Firemen Act ("Police and Fire Civil Service Act"), 53 P.S. §§ 46171-46195, and the Policemen and Firemen Collective Bargaining Act ("Act 111"), 43 P.S. §§ 217.1-217.10. The Police and Fire Civil Service Act, derived from the Police Civil Service Act of 1941 and now codified as Article XI (j) of the Pennsylvania Borough Code, is a civil service law which sets forth the basic criteria and procedures by which borough police officers and fire fighters are to be hired, promoted, demoted, or discharged.[2] Act 111, enacted in 1968, authorizes collec-

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[2] The Police and Fire Civil Service Act applies only to those boroughs with a police force of three or more members. 53 P.S. § 46171. The Police Tenure Act applies to those boroughs with smaller police forces, as well as to certain townships, and provides largely similar protections to the Police and Fire Civil Service Act. *See* 53 P.S. §§ 811-816. Civil service laws specifically designed for police and/or fire fighters apply to other Pennsylvania political subdivisions as well.

tive bargaining and arbitration for police officer and fire fighters in Pennsylvania.[3]

Section 46190 of the Police and Fire Civil Service Act provides that "[n]o person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for [six specified] reasons." 53 P.S. § 46190. An employee who believes he has been suspended, removed, or reduced in rank in violation of the Act's provisions may challenge that violation before the borough's civil service commission. *See* 53 P.S. § 46191. The commission's decision may then be appealed to the

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note 2 cont.

See 16 P.S. §§ 4501-4525 (creating a civil service system for police and fire fighters in second class counties), 53 P.S. §§ 39861-39877 (creating a civil service system for fire fighters in cities of the Third Class), 53 P.S. §§ 58251-58277 (creating a civil service system for police in incorporated towns), 53 P.S. §§ 58301-58328 (creating a civil service system for fire fighters in incorporated towns). An assortment of other laws provide civil service protections to non-uniformed public employees employed by Pennsylvania and its political subdivisions. *See, e.g.*, Pennsylvania Civil Service Act, 71 P.S. §§ 741.1-741.1005 (creating a civil service system for non-uniformed state and some county employees).

[3] Act 111 provides collective bargaining rights to all "[p]olicemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth." 43 P.S. § 217.1. The Pennsylvania Labor Relations Act ("PLRA"), 43 P.S. §§ 211.1-211.13, extends collective bargaining rights to private employees not covered by the National Labor Relations Act. Act 111 has been read *in pari materia* with the PLRA, and many aspects of the PLRA's enforcement scheme are thus available to police and fire personnel and their employers covered by Act 111. *See, e.g., Borough of Nazareth v. Pennsylvania Labor Relations Board*, 534 Pa. 11, 626 A.2d 493 (1993); *Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board*, 470 Pa. 550, 369 A.2d 259 (1977). The Pennsylvania Public Employe Relations Act ("Act 195"), 43 P.S. §§ 1101.101-1101.2301, provides collective bargaining rights to non-uniformed public employees employed by the state or its subdivisions.

court of common pleas. *Ibid.* Judicial review of a municipal civil service commission's decision "is limited to determining whether constitutional rights have been violated, an error of law has been committed[,] or findings of fact necessary to support the adjudication are not supported by substantial evidence." *Day v. Civil Service Commission of the Borough of Carlisle*, 593 Pa. 448, 455, 931 A.2d 646, 650 (2007), quoting *Lewis v. Civil Service Commission of Philadelphia*, 518 Pa. 170, 542 A.2d 519, 522 (1988) (citing 2 Pa.C.S. § 754(b) and *Tegzes v. Township of Bristol*, 504 Pa. 304, 472 A.2d 1386 (1984)).

The collective bargaining agreement between the Borough of Duryea and the Duryea police incorporates Section 46190 of the Act by reference. *See* JA 57. Article 17 of the agreement provides:

> "No full time police officer covered by this agreement shall be discharged, suspended or demoted except for 'just cause' as defined in the civil service provisions of the Pennsylvania Borough Code, 53 P.S. Section 46190." *Ibid.*

Article 16 of the agreement provides for "final and binding arbitration" of "any dispute involving the interpretation and/or application of the terms of this Agreement, or any dispute involving the interpretation and/or application of the Borough's policies or procedures which affect the terms and conditions of employment, including matters of discipline." *Id.* at 56. By challenging his 2003 discharge through arbitration, Guarnieri waived resort to the civil service procedures. *See Township of Falls v. Whitney*, 730 A.2d 557, 561 (Pa. Commw. Ct. 1999).

The legal effect of the arbitration award reinstating Guarnieri was governed by Act 111, which sanctions the arbitration of disputes arising under a police or fire department collective bargaining agreement. *Pennsyl-*

vania State Police v. Pennsylvania State Troopers' Ass'n, 540 Pa. 66, 656 A.2d 83, 88 (1995). Act 111 provides that arbitration awards operate as a direct "mandate" to the public employer and thus are legally binding on the employer without the necessity of procuring a judicial order confirming the award. 43 P.S. § 217.7.[4] Failure to comply with an arbitration award constitutes an unfair labor practice subject to the remedial authority of the Pennsylvania Labor Relations Board. *See Smith v. Borough of Castle Shannon*, 163 Pa. Commw. Ct. 531, 641 A.2d 671, 673 (1994). A public employer that wishes to avoid the binding mandate of an arbitration award under Act 111 may petition to vacate the award, but "a court reviewing an Act 111 grievance arbitration award has an extremely limited scope of review." *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n*, 559 Pa. 586, 741 A.2d 1248, 1251 (1999). "[A] mere error of law would be insufficient to support a court's decision to reverse an Act 111 arbitrator's award." *Id.* at 1252.

The Borough did not petition to vacate the arbitration award finding that the Borough lacked just cause for discharging Guarnieri in February 2003. Thus, the award had the legal effect of a direct "mandate" to the Borough to remedy that legal wrong in the prescribed manner. 43 P.S. § 217.7(a). Failure of the Borough to implement the award would have violated Act 111 and the Pennsylvania Labor Relations Act. *See, e.g., City of Philadelphia*, 30 PPER 30204 (PLRB 1999).

In sum, Guarnieri invoked the legal procedures sanc-

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[4] A 1967 amendment to the Pennsylvania Constitution expressly authorized "the legislature to promulgate statutes which would provide for binding grievance and interest arbitration between police and fire personnel and their public employers." *Pennsylvania State Police*, 656 A.2d at 89 n. 14. *See* Pennsylvania Constitution Art. 3, Sec. 31.

tioned by Act 111 in arbitrating his claim that the Borough had violated the collective bargaining agreement and Section 46190 of the Police and Fire Civil Service Act incorporated in that agreement by discharging him in 2003. And, the adverse employment actions taken by the Borough against Guarnieri upon his reinstatement constituted retaliation for litigating his legal claim through the procedures provided by law.

SUMMARY OF ARGUMENT

The right to bring a legal claim to the forum provided by law implicates the basic concerns of the First Amendment's Petition Clause.

Employer retaliation against an employee who brings a legal claim to the proper forum for resolution is not a legitimate exercise of managerial discretion. The law uniformly forbids such employer action. Retaliation against an employee-litigant has nothing to do with the employer managing its own operations. Rather, such retaliation is an abuse of the employer's authority for the purpose of discouraging employees from bringing their legal claims against the employer to the proper forum. That being so, there is no reason that an employee-litigant's right to petition for redress of grievances should give way to an employer's interest in retaliating against the employee for so doing.

Public employees who suffer adverse employment action in retaliation for litigating claims against their public employers, therefore, have a cognizable claim under the Petition Clause of the First Amendment.

ARGUMENT

The question presented by this case is whether Charles Guarnieri has a Petition Clause claim against the Borough of Duryea for retaliating against him for litigating his

wrongful discharge claim. "[T]wo main principles" determine the extent to which a constitutional claim "is cognizable in the public employment context".

> "First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600 (2008).

The right of public employees to petition for redress of legal claims through the litigation procedures provided by law *does* "implicate[] basic concerns" of the Petition Clause of the First Amendment. There is, moreover, *no* legitimate interest of the government as employer that would cause this right to "give way." Thus, a Petition Clause claim against the government for retaliating against one of its employees for seeking redress of a legal claim through the litigation procedures provided by law "is cognizable."

1 As a general matter, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). "The right to litigate is an important one," *id.* at 744, that covers the full range of litigation, including "litigation . . . solely designed to compensate the victims of [personal wrongs]," *Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967). The right to litigate is not confined to judicial litigation but equally "governs the approach of citizens or groups of them to administrative agencies" and, indeed, "to all departments of the Government."

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). All that being so, litigation of a legal claim against the government through any of the "channels and procedures" provided by law – whether before a court, an administrative agency or a government-sanctioned arbitrator – implicates the basic concerns of the Petition Clause. *Id.* at 511.

Guarnieri's litigation of his wrongful discharge claim through the arbitration procedure provided by law was an exercise of the right to litigate protected by the Petition Clause. That claim sought redress of a violation of Section 46190 of the Police and Fire Civil Service Act, which was incorporated in the collective bargaining agreement covering Guarnieri's employment. *See* JA 57. Guarnieri chose to take his wrongful discharge claim to arbitration rather than to the Borough's police and firemen civil service commission. Under Act 111, the arbitration award in Guarnieri's favor had the force of law, and the Borough was constrained to obey the award.

The Borough does not contend that Guarnieri's litigation of his wrongful discharge claim is entitled to any less protection by virtue of his having litigated before an arbitrator rather than before the civil service commission. Both avenues are government-sanctioned procedures for adjudicating that statutory wrongful discharge claim. And both avenues provide for legally binding decisions. Thus, leaving aside that Guarnieri was a public employee, his litigation of the wrongful discharge claim through arbitration under Act 111 is well within the "important" "right to litigate" protected by the Petition Clause. *Bill Johnson's Restaurants*, 461 U.S. at 744.

2. Not only did Guarnieri's litigation of his wrongful discharge claim against the Borough "implicate[] the basic concerns of the [Petition Clause]," there is no sound reason that his right to bring that litigation should "give

way to the requirements of the government as employer." *Engquist*, 553 U.S. at 600.

With respect to a number of constitutional rights, this Court has "recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. at 599. "The extra power the government has in this area comes from the nature of the government's mission as employer," i.e., from the fact that "[g]overnment agencies are charged by law with doing particular tasks" and "hire employees to help do those tasks as effectively and efficiently as possible." *Id.* at 598 (brackets, quotation marks and citations omitted).

In particular, this Court "ha[s] refrained from intervening in government employer decisions that are based on speech that is of entirely private concern." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Thus, in *Connick v. Myers*, 461 U.S. 138 (1983), the Court held "that the First Amendment protects public-employee speech only when it falls within the core of First Amendment protection — speech on matters of public concern." *Engquist*, 553 U.S. at 600. The Borough would apply *Connick*'s holding outside the context of "government employer decisions that are based on speech," *Waters*, 511 U.S. at 674, to insulate government employer decisions to retaliate against an employee's "use [of] the channels and procedures" provided by law for adjudicating legal claims, *California Motor Transport*, 404 U.S. at 511. That suggested extension of *Connick* has no basis in the decision's holding or rationale.

Connick carved out an exception to the basic First Amendment principle that "the government . . . [can]not generally prohibit or punish . . . speech on the ground that it does not touch upon matters of public concern."

Engquist, 553 U.S. at 600. That exception withholds First Amendment protection from public employees for "expression [that] cannot be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. The basis for this exception is a very practical concern that "government officials should enjoy wide latitude in managing their offices," *ibid.*, comparable to that enjoyed by private employers. *See id.* at 147

Connick's exception to the First Amendment's general prohibition on government punishment of speech rests on the assessment that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Engquist*, 553 U.S. at 600 quoting *Connick*, 461 U.S. at 147. Evaluating "the wisdom of a personnel decision," *Connick*, 461 U.S. at 147, in reaction to employee speech can involve "a vast array of subjective, individualized assessments," *Engquist*, 553 U.S. at 603, such as whether the decisionmaker "reasonably believed [that an employee's speech] would disrupt the office, undermine his authority, [or] destroy close working relationships." *Connick*, 461 U.S. at 154. And, these determinations, in turn, require an evaluation of concrete circumstances, such as, "the manner, time, and place" of the speech. *Id.* at 152. Given the myriad considerations involved in making such a personnel decision, the Court "ha[s] refrained from intervening in government employer decisions that are based on speech that is of entirely private concern," even though "some such speech is sometimes nondisruptive" and "sometimes of value to the speakers and the listeners." *Waters*, 511 U.S. at 674.

The critical point for present purposes is that the holding in *Connick* is justified by a concern with "affording

government employers sufficient discretion to manage their operations" and particularly with avoiding "displacement of managerial discretion by judicial supervision." *Garcetti v. Ceballos*, 547 U.S. 410, 422-23 (2006). That concern does not, however, apply to "judicial oversight," *id.* at 423, of employer decisions to retaliate against employees for advancing legal claims through the proper "channels and procedures," *California Motor Transport*, 404 U.S. at 511. While the law generally recognizes that employers have a substantial legitimate interest in making "personnel decision[s] . . . in reaction to [an] employee's behavior," *Connick*, 461 U.S. at 147, the law does *not* treat personnel decisions taken in retaliation for litigation as a legitimate exercise of "managerial discretion," *Garcetti*, 547 U.S. at 423. To the contrary, the law treats the regulation of litigants as a matter peculiarly appropriate for "judicial supervision." *Ibid.* For precisely that reason, the law uniformly forbids employer retaliation against employee litigants.

To begin with, virtually every statute creating legal protections for employees contains an express prohibition on employer retaliation for resort to the statutory enforcement procedures. *See, e.g.*, 29 U.S.C. §158(a)(4) (National Labor Relations Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e-3(a) (Title VII of the Civil Rights Act). Pennsylvania law, moreover, makes it an unfair labor practice for public employers, such as the Borough, to retaliate against employees for bringing grievances to the arbitration mandated by the State's labor laws. *See Derry Borough*, 29 PPER ¶ 29237 (Final Order, 1998). In the absence of an express prohibition on retaliation, the substantive provisions of employment statutes will, if possible, be construed to extend protection against employer retaliation against employees who invoke the statutory rights. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) ("the ADEA fed-

eral-sector provision's prohibition of 'discrimination based on age' . . . likewise proscrib[es] retaliation"); *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 174 (2004) ("retaliation is discrimination 'on the basis of sex'" in violation of Title IX).

Where there is no statutory retaliation prohibition, the common law provides a tort remedy against employers – both private and public – for taking adverse employment action against an employee for litigating an employment law claim. Thus, the Restatement (Third) of Employment Law states as a black letter rule that "[a]n employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity [as defined] is subject to liability in tort for wrongful discipline in violation of public policy" and includes among the defined protected activities "fil[ing] a charge or claim[ing] a benefit under the procedures of an employment statute or law (irrespective of whether the charge or claim is found meritorious)." Restatement (Third) of Employment Law §§ 4.01 & 4.02(c) (Tentative Draft No. 2, 2009).[5] "[T]he rationale behind this rule," the Restatement explains, "is to protect the public interest embodied in the employment laws by blunting the ability of employers to use economic pressure to undermine the willingness of employees to claim employment benefits or rights to which they are entitled." *Id.* § 4.02, comment d. "Public policy favors the filing of charges, claiming of benefits, or other participation in the formal administra-

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[5] The cited version of the Restatement Third of Employment Law was approved by the membership of the American Law Institute at its 2009 Annual Meeting "subject to the discussion at the meeting and to editorial prerogative." *See* www.ali.org/index.cfm?fuseaction= publications.ppage&node_id=31 (last checked Dec. 17, 2010). Once approved, "Tentative Drafts may be cited as representing the most current iteration of the [American Law] Institute's position until the official text is published." *Ibid.*

tive and judicial processes of the employment laws." *Ibid.*

In sum, "the requirements of the government as employer," *Engquist*, 553 U.S. at 600, do not extend to taking adverse employment action against employees for bringing legal claims through the proper "channels and procedures," *California Motor Transport*, 404 U.S. at 511. Thus, there is no reason that the "important" "right to litigate" protected by the Petition Clause. *Bill Johnson's Restaurants*, 461 U.S. at 744, should "give way," *Engquist*, 553 U.S. at 600, to make room for that retaliatory employer conduct.

3. The Borough's brief to this Court tacitly admits that its interest in being free to retaliate against employees who litigate legal claims of the sort brought by Guarnieri has nothing to do with "manag[ing] [its] operations," *Garcetti*, 547 U.S. at 422, and everything to do with preventing its employees from bringing legal claims to the proper forums.

The Borough argues, in this regard, that "the practical challenges of the government's role as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges an informal complaint or simply engages in speech." Pet. Br. 40-41. However, the only support the Borough can muster for its assertion that formal "[g]rievances and lawsuits are likely to be even more disruptive and polarizing than less formal communications," *id.* at 41, is the observation that "less formal communications" are more amenable to "voluntary compromise," *ibid.*, and are not a drain on the employer's "litigation budget," *id.* at 43. Those objections, however, apply to any litigation brought against the government and have nothing to do with "managing the[] office[]." *Connick*, 461 U.S. at 146.

The Borough also argues that protecting employees against retaliation for "invok[ing] the procedures of the law," Restatement, comment d, would allow "an end-run around *Connick*'s public concern requirements" by granting protection to employees who "recast informal complaints as official grievances or lawsuits," Pet. Br. 36. But protecting employees who bring "official grievances or lawsuits," *instead* of making informal complaints, is *not* an evasion of *Connick* at all. And, the public employer's discretion to discipline an employee for making disruptive informal complaints would not be limited by the employee also filing a formal complaint, for it would be a complete defense to any petition clause claim brought by the employee that the discipline was imposed because of the employee's unprotected speech.

In the end, the Borough's argument that public employers should have leeway in disciplining public employees who bring legal claims against them boils down to nothing more than a plea to allow "a public employer to leverage the employment relationship," *Garcetti*, 547 U.S. at 419, in order "to use economic pressure to undermine the willingness of employees to claim employment benefits or rights to which they are entitled," Restatement § 402, comment d. Subjecting this sort of public employer conduct to "judicial supervision" presents no risk to any legitimate exercise of "managerial discretion." *Garcetti*, 547 U.S. at 423

4. As an afterthought, the Borough attempts to turn the uniform legal condemnation of employer retaliation against employee-litigants to its advantage by pointing out that public employees frequently have statutory and contractual remedies for that wrong. Pet. Br. 52-58. As grounds for denying public employees First Amendment protection against such retaliation, the Borough notes that many of these remedies may be better suited to

redressing retaliatory disciplinary actions than what the Borough describes as "a one-size-fits-all cause of action under the Petition Clause." Pet. Br. 53.

Be that as it may, whether public employees have a cause of action under the Petition Clause is *not* a matter of "the creation of a new judicial remedy." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Congress created a remedy by enacting § 1983, which provides a cause of action against anyone who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. And, as a general matter, litigants are not required to exhaust available administrative or other remedies before bringing a claim under § 1983. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

Of course, "litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective." *Patsy*, 457 U.S. at 513 n. 15. And, we expect that most public employees would first seek to redress retaliation claims through any available statutory and contractual remedies before going to the expense of bringing a § 1983 lawsuit. But the choice of forum is for the plaintiff-employee and not for the defendant-employer.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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